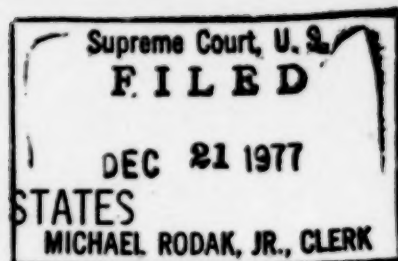


IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977



No. 77-214

C. CLYDE ATKINS, ET AL.,
PLAINTIFFS

v.

UNITED STATES OF AMERICA
DEFENDANT.

BRIEF OF AMICUS CURIAE ON BEHALF OF
JACOB K. JAVITS AND EDMUND S. MUSKIE,
UNITED STATES SENATORS, IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

JACOB K. JAVITS
UNITED STATES SENATOR
U.S. SENATE
WASHINGTON, D.C.

FOR HIMSELF AND FOR,

EDMUND S. MUSKIE
UNITED STATES SENATOR
U.S. SENATE
WASHINGTON, D.C.

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INTEREST OF AMICI CURIAE

Amici, are members of the United States Senate who are supporting the motion by petitioners in the three consolidated cases in order to seek judicial resolution of the constitutionality of the legislative veto. Amici do not express interest in other issues which may come before the Court in this case, but limit their petition to the question of the legislative veto involved and its constitutionality.

Both Senators are members of the Committee on Governmental Affairs which has in the first session of the 95th Congress been presented with several legislative proposals incorporating a legislative veto mechanism, including the Reorganization Act of 1977 and proposals to create a Department of Energy. In addition, Senator Muskie serves as Chairman of the Senate Budget Committee and is a member of the Committee on Environment and Public Works where he must consider legislative veto provisions contained in the Congressional Budget and Impoundment Control Act of 1974, as well as similar provisions in various environmental laws and proposed amendments. For example, an amendment proposed this year to the Clean Air Act and the Clean Water Act would have provided for legislative veto provisions over proposed executive branch actions but these provisions were rejected by House-Senate conference committees on which Senator Muskie served.

Senator Javits also is the ranking minority member of the Committee on Human Resources and a senior member of the Committee on Foreign Relations. As a member of those committees he has been involved with consideration of legislative veto provisions related to the Employee Retirement Income Security Act, 29 U.S.C. §1001 et. seq., and the War Powers Act, 50 U.S.C. §1541-1548 and the proposed Nuclear Nonproliferation Act of 1977.

REASON FOR GRANTING THE WRIT

Because of the increasing reliance by the Congress on the legislative veto mechanism as an instrument for review and oversight of Executive Branch actions, amici, as members of the United States Senate, urge this Court to resolve the constitutionality of the procedure because the issue is, in the words of the Solicitor General, "unquestionably significant ... important and recurring," -- an issue which ought to be decided in an appropriate case.

While the importance of this issue has been slow to develop, it has accelerated in this decade with an unprecedented number of laws having passed the Congress which incorporate a legislative veto mechanism.

The Congressional Research Service of the Library of Congress has advised that of the 192 bills embodying legislative vetoes enacted between 1932 and 1975, more than half were enacted since 1970. A total of 351 resolutions have been introduced between 1960 and 1975 which proposed to veto executive actions covered by the foregoing laws. Of those, 244 were introduced in 1974 or 1975.

In this first session of the 95th Congress alone, seven measures have become public law with the inclusion of a legislative veto mechanism. Another seven bills have passed the House of Representatives and two have passed the Senate which would incorporate

similar procedures (see Appendix A). Before many more laws are constructed which delegate authority to the Executive Branch agencies, and which rely on this reservation of authority in the Congress, it is important to have a definitive resolution of the constitutionality of the procedure. The importance of this issue cannot be overestimated to the evolution of the separation of powers doctrine and to the balance of powers between the branches of the Federal government. We urge the Court to supply guidance and substance to these underlying principles of the Constitution, heeding Justice Marshall's admonition that "it is a Constitution we are expounding" (Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 597) (1952).

The instant case presents the issue of the legislative veto squarely and directly. It is a form of its use typical of its many forms utilized by Congress. Furthermore, it is doubtful that any other case will come before the Court for some time which more clearly presents the question of the constitutionality of the legislative veto.

The Government, in its opposition brief to the petition for a writ of certiorari, states the view that the one-House veto provision of the Salary Act was unconstitutional. The Government further concludes that a "clear judicial resolution of the constitutional issue is of the utmost importance" (U.S. Brief, pp. 15-16), yet, they argue that this case does not offer the occasion for resolving this question.

Congress has been reluctant to exercise the veto authority which it has included in other public laws. In some instances, the exercise of a veto involved the proposed expenditure of appropriated funds, or the rejection of government reorganization plans submitted by the President. But in such instances, standing for judicial review often would be difficult to obtain. Other cases which have raised the issue have been more appropriately decided on other grounds, such as Buckley v. Valeo, 424 U.S. 1 (1976), or involved problems of ripeness or mootness. Clark v. Kimmit, No. 76-1105, (June 6, 1977).

Another pending case involving this issue, Chadha v. Immigration and Naturalization Service, No. 77-1702, (9th Cir), may not be decided for a lengthy period. In that case, the petitioner, an alien, was ordered deported pursuant to legislation delegating such powers to one House of Congress. While the facts of the case would seem to clearly present the issue, the average time for issuing decisions on similar cases in that circuit indicate that it could be a considerable time before it could be in a position to be considered by this Court. Furthermore, an agreement between the petitioner and the government on the merits of that case could have the effect of mootng the case, as could legislation which the Administration has proposed dealing with the rights of certain aliens.

Amici believe there is no other case which could be presented to the Court which squarely presents this issue. It is of

utmost importance to the Congress and to the Government as a whole that the issue be resolved at the earliest possible time.

CONCLUSION

For the reasons set out above, Amici respectfully submit that the petition for writ of certiorari should be granted in order to permit this Court to decide the very important question of the constitutionality of the legislative veto.

APPENDIX A

PUBLIC LAWS:

- 95-17 Reorganization Act of 1977
- 95-19 Emergency Unemployment Compensation Extension Act
- 95-52 Export Administration Amendments of 1977
- 95-75 International Navigational Rules Act
- 95-82 Military Construction Authorization Act
- 95-148 Foreign Assistance & Related Programs Appropriations Act
- 95-192 Soil & Water Resources Conservation Act

BILLS PASSED BY HOUSE:

- H.R. 10 - Federal Employees Political Activities Act, passed House, June 7, 1977
- H.R. 3199 - Federal Water Pollution Control Act Amendments, passed House, April 5, 1977
- H.R. 3816 - Federal Trade Commission Amendments, passed House, October 13, 1977, passed Senate, October 20, 1977
- H.R. 5263 - Energy Tax Bill, passed House, October 28, 1977
- H.R. 5885 - Public Rivers and Harbors Act, passed House, May 17, 1977, passed Senate, June 22, 1977
- H.R. 8410 - Labor Reform Act, passed House, October 6, 1977
- H.R. 8444 - National Energy Act, passed House, August 5, 1977

BILLS PASSED BY SENATE:

- S. 9 - Outercontinental Shelf Lands
Act Amendments, passed Senate,
July 15, 1977
- S. 37 - ERDA Synthetic Fuel Loan and
Guarantee Program, passed
Senate, March 31, 1977

APPENDIX B

KEVIN M. FORDE, LTD.

ATTORNEY AT LAW

111 WEST WASHINGTON STREET - SUITE 2025

CHICAGO, ILLINOIS 60602

PHONE 798-8015
AREA CODE 312

November 11, 1977

Senator Edmund S. Muskie
UNITED STATES SENATE
Washington, D.C. 20510

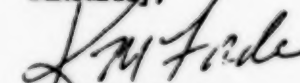
Attention: James H. Davidson
Counsel

Re: Letter of Consent to File an Amicus
Atkins, et al. v. United States,
No. 77-214

Dear Senator Muskie:

On behalf of the Petitioners in the cause of Atkins, et al.
v. United States, No. 77-214, we are authorized to advise you
that you and Senator Jacob K. Javitz have our consent to file
a Brief Amicus Curiae in this cause.

Sincerely,



Kevin M. Forde
Attorney for Petitioners

KMF:ba



APPENDIX C
Office of the Solicitor General
Washington, D.C. 20530

November 10, 1977

Honorable Edmund S. Muskie
United States Senate
Washington, D. C. 20510

Re: Atkins v. United States
No. 77-214

Dear Senator Muskie:

As requested in your letter of November 9, 1977, I
consent to the filing in the above case of a brief amicus
curiae by yourself and Senator Javits.

Sincerely,

Dan M. Friedman
Daniel M. Friedman
Acting Solicitor General